

Michigan Law Review

Volume 100 | Issue 8

2002

Reflections (On Law Review, Legal Education, Law Practice, and My Alma Mater)

Harry T. Edwards

United States Court of Appeals for the D.C. Circuit

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

 Part of the [Legal Education Commons](#)

Recommended Citation

Harry T. Edwards, *Reflections (On Law Review, Legal Education, Law Practice, and My Alma Mater)*, 100 MICH. L. REV. 1999 (2002).

Available at: <https://repository.law.umich.edu/mlr/vol100/iss8/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

REFLECTIONS (ON LAW REVIEW, LEGAL EDUCATION, LAW PRACTICE, AND MY ALMA MATER)

Harry T. Edwards*

It is an honor for me to offer some reflections in commemoration of the 100th anniversary of the *Michigan Law Review*. I have many fond memories of my time at the University of Michigan Law School, both as a law student and a member of the faculty. I was therefore pleased to accept the assignment to present the keynote address at the Centennial Celebration banquet.

It is hard for me to believe that it has been almost 40 years since I was invited to serve on the *Michigan Law Review*. I remember it like it was yesterday, for it was a very exciting moment for me. In those days, an invitation to try out for the *Law Review* was based solely on grades — if you were in the top 10% of the class at the end of your first year, you received an invitation. In my year, I think the grade-point cutoff for *Review* was about 3.2 or 3.3. We had no A+, A-, or B+ grades then — the top of the grade range was A, B, and C+ — so a 3.3 was a sterling GPA. A's were hard to come by in those days.

An “invitation” from the *Law Review* did not guarantee election. Rather, those of us who received an invitation were required to write Notes or Comments during our second year, after which we faced an election. And, not everyone who accepted an invitation to try out was ultimately elected to serve on the *Review*. In fact, our names did not appear on the *Law Review* masthead until the end of our second year of law school, after we were elected to serve.

When I was a would-be editor of the *Review*, I wrote two notes, both of which were published in April 1964. One note dealt with the authority of the Federal Power Commission to limit the rate of return on tax reserves resulting from the use of liberalized depreciation.¹ I am sure that I found nothing enjoyable in this project, for, even to

* Circuit Judge, Chief Judge Emeritus, U.S. Court of Appeals for the D.C. Circuit. B.S. 1962, Cornell; J.D. 1965, University of Michigan. Prior to his appointment to the D.C. Circuit, Judge Edwards practiced law for five years in Chicago, Illinois, and then served as a Professor of Law at Michigan and Harvard Law Schools. While on the bench, he has taught part-time as an Adjunct Professor of Law at Duke, Georgetown, Pennsylvania, Harvard, Michigan, and NYU Law Schools.

Judge Edwards presented this paper as the keynote address at the Centennial Celebration banquet of the *Michigan Law Review*, on February 16, 2002, in Ann Arbor, Mich. — Ed.

1. Harry T. Edwards, *Recent Decisions*, 62 MICH. L. REV. 1036 (1964).

this day, I do not relish analyzing cases from the Federal Energy Regulatory Commission (the successor agency to the FPC). My second note discussed whether section 43(a) of the Lanham Act created a federal right of action against particular kinds of unfair competition in interstate commerce.²

I would like to say that my first publications were seminal contributions to legal literature, resulting in profound changes in the law. Such a claim would be quite fanciful, however. But I can safely say that the opportunity to engage in serious legal research did have a profound affect on me.

I have never thought that election to the *Law Review* significantly distinguished me from my classmates at the University of Michigan Law School, for there were scores of very talented people in my class. Service on the *Law Review* was very special for me, however, because it forced me to be rigorous in my legal research; instilled discipline in my writing; fine-tuned my analogical reasoning; prompted a healthy sense of skepticism in my analysis of legal problems; made me confident in my work; and fostered a love of the law and the legal profession that I have never lost.

I also gained some lifelong friends during my time on the *Law Review*. In fact, when I recently looked back at the *Law Review* masthead for 1964-65, I was struck that I remembered almost everyone listed. The members of the *Review* were a relatively close-knit group — we challenged, inspired, and supported one another in ways that were mutually beneficial, and in ways that I think served us well in the years after graduation.

I have no idea whether law reviews of today instill the same sense of comradery and foster the same levels of learning that I experienced 40 years ago. I hope so, for it can be an incalculably great legacy for those who participate in the enterprise.

I am often asked what I think about the work of law reviews, beyond their mission in training law students. That remains a difficult question for me. I have always had misgivings about student editors evaluating and editing the work of professors, for, normally, students do not have the training, experience, or wisdom to make judgments on scholarly work that I think should be subject to peer review. I do not want to overstate the problem, however. There are a good many law review editors who are quite able in their work. And there are also more than a few law professors who have relied on law review editors to complete their unfinished articles.

2. Harry T. Edwards, *Recent Decisions*, 62 MICH. L. REV. 1094 (1964).

The most serious concern that I have with legal scholarship is that too much of it is useless. Professor Robert Gordon of the Yale Law School has written that

[t]he legal-academic machine is undoubtedly cranking out a good deal of useless blather: articles that seem to have hardly anything to do with addressing or understanding any legal problem, articles clotted with hermetic jargon or puffed up with self-indulgent posturing, articles clumsily practicing intellectual modes that people in other fields execute with much more grace and precision, articles borrowing intellectual fashions that would be better off never having been invented.³

I agree. But this is not the fault of the law reviews, for the law reviews merely reflect some disturbing trends in legal education.

Recently, I participated in a conference entitled "Norms and the Law," celebrating the opening of the Center for Interdisciplinary Studies at the Washington University School of Law.⁴ There were a number of brilliant scholars from a variety of disciplines in attendance, including social scientists, political scientists, economists, and lawyers. And the array of conference topics included matters such as "economics of the household," "how norms overcome the tragedy of the commons," "damages, norms and punishment," "judging and ascriptive group identity," and "other-regarding preferences and social norms." What struck me most was the difficulty that people from different disciplines had in communicating with one another. One problem was that experts from one discipline sometimes did not understand or accept the research methodologies employed by experts from another discipline. Another problem was that persons from one field sometimes could not translate the "foreign" language of another discipline into concepts that made sense to them. The worst problem, at least from my perspective, was the level of generality of the discussions. Abstractions abounded in the discussions, probably because it made it easier for those from different disciplines to communicate. The result, however, was that most of the conversations were devoid of prescriptions. Even when social problems were identified, very little was said about how to address them. The conversations were the stuff of graduate schools, not law schools.

I think what I saw at Washington University is a reflection of the present struggle in law schools throughout the country. We nobly embrace the idea of interdisciplinary legal studies, but we do not as yet know how to incorporate the idea without undermining what is good

3. Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2076-77 (1993); see also Lee Epstein & Gary King, *The Rules of Inference*, 69 CHI. L. REV. 1, 6 (2002) ("[T]he current state of empirical legal scholarship is deeply flawed") (emphasis in original).

4. *Norms and the Law*, a conference celebrating the opening of the Center for Interdisciplinary Studies at the Washington University School of Law, Mar. 30-31, 2001, St. Louis, Mo.

about traditional legal education. Often we do not know how to assess the work of other disciplines, so we do not know how to credit these materials. As a consequence, we sometimes simply adopt a “graduate school” approach in addressing interdisciplinary legal studies, probing matters from other disciplines merely because they are interesting and provocative in their own right. What we too often fail to do, however, is draw on substantive materials from other disciplines to *give content* to law and justice, which, of course, is the mission of legal education. So it is not a surprise that at a recent conference on legal education sponsored by the Yale Law School, one of the principal issues raised by the conference planners was whether the incorporation of interdisciplinary legal studies is “necessarily a hodge-podge of methods and perspectives, drawn from mutually opaque intellectual cultures.”⁵

Why the “hodge-podge?” I used to think that there were not enough people in legal education who knew enough about interdisciplinary studies to make a difference, and that those who were present were much better in law than in their other discipline. I think this is less of an issue today, both because there are now a number of good JD/PhDs on law faculties and also because more law professors now know more about other disciplines. The problem, however, is that too many legal scholars and teachers continue to discuss material from non-law disciplines as if it has nothing in particular to do with legal content. I still hear some law professors who do work in non-law areas speak disdainfully of applying their work in legal contexts. Legal doctrine is dismissed as trite. And abstractions are favored over prescriptions. It makes little sense to me.

To pursue the mission of legal education, we need to ask questions like: How do we draft, administer, fund, and enforce laws that serve the legitimate ends of a democratic society? How do we create systems of justice to ensure equality and fairness for all who are affected by laws? How do we integrate the laws of different states, federal and state laws, and the laws of different nations? How do we regulate those who practice law? These are large questions that legal doctrine by itself cannot answer. Legal education therefore necessarily includes an element of interdisciplinary studies, because lawyers need to test the premises underlying legal rules.

For example, members of the legal profession concerned in any way with criminal law must understand the science of DNA evidence. And members of the legal profession involved with administrative regulation need to understand the economics of regulation. There are numerous other examples that I could cite. But the important point is not that legal scholars should know some science or economics, but,

5. Yale Law School Tercentennial Conference, *Dissolving Boundaries: Law, Law Jobs and the Role of Law Schools in the New Century*, Apr. 27-29, 2001, New Haven, Conn. (memorandum detailing proposed list of panels and themes).

rather, that they should know how to apply it to enhance the work of our profession. DNA is important not because it is merely an interesting scientific phenomenon; it is important because it may affect determinations of guilt and innocence in our criminal justice system. Lawyers need to know the limits of the science in order to be able to craft legal principles that take full advantage of what the science offers. Justice is then better served.

In no event, however, should we abandon the structural center of legal education in favor of other things. Instead, legal educators and scholars should use the broad vision of their mission to strengthen the relationship between law and other disciplines. If I were to use an architectural metaphor, I would say that law and the achievement of justice is the structural center and the other fields are the buttresses to it. Both the center and the buttresses have to be present, playing their distinct roles. The buttresses are crucial in assisting us in our central mission. They do not *become* the mission itself.

It makes no sense to talk about legal materials without reference to our goals for society, which entail extralegal forms of knowledge and inquiry. However, legal scholars and educators have a unique obligation to employ some pragmatism when engaging with other disciplines.

Legal education and scholarship are unique in another way. Scholars in other disciplines often do not have an obligation to be *both* descriptive and normative. For example, scholars of literature could be normative and ask, what is the best way to write, but they need not be — it is enough if literary criticism shows us how texts work. Historians could give us lessons for the future, but they need not — it is enough if history describes how the past unfolded in a way that sheds light on it. Legal scholars and educators, on the other hand, *must* be both descriptive and normative to pursue law and justice. We have an obligation not just to clarify legal issues but to help solve them and produce the best and most just answers to concrete problems.

It is deeply ironic that our commitment to global justice often makes us the envy of the rest of the academy. We aim to make things happen in the world. Academics from the social sciences and humanities sometimes envy us for our connection to the things that shape human affairs. So think of how silly we seem if we insist on doing what they do, often in an amateurish way. We should value our uniqueness and the responsibility it confers on us.

In June of 2000, I moderated a panel on legal education in the 21st century. One of the panelists, Dean Robert Clark, from Harvard Law School, argued that,

[i]n the last 35 years, the most important development [that we have seen] has been the sheer growth and differentiation of legal education

which reflects a similar pattern of development in the legal profession. . . . [T]he claim of the legal system on the economy and polity, both absolutely and in percentage terms, has gone up. The same can be said of the legal profession. It is much bigger And many more areas of life, economic and social, are covered by law.

The academy has responded to this — not necessarily consciously, quickly, or certainly not optimally — but it has responded [T]here are many more law schools, many more law students, many more professors, and a vastly bigger curriculum that covers more subjects. As a result of this growth, there has been differentiation Now we have scholars who are high theorists, who are purely historians of law, and law and economics people. We also have many more interdisciplinary specialists[,] . . . [clinical law teachers, and experts in international law]

[T]his parallels developments in legal practice. It's a massive phenomenon, and it's quite natural — not necessarily good though.⁶

In my view, Dean Clark is quite right when he says that many of the developments in legal education have not been pursued “consciously, quickly, or optimally,” and that many of these developments have not necessarily been good.

For example, it is true that there are many more courses now being taught in law school. I would maintain, however, that the expanded curriculum in law schools has led to some incoherence in legal education. John Sexton, formerly the Dean of the NYU Law School, has argued that a major problem with legal education is that at least two-thirds of law student course work is not guided by content — students study what they want in the second and third years of law school, often with no good pedagogical reasons for their course selections.⁷ He has proposed that law students should have a “distribution requirement” in their course work, to ensure that they are exposed to a spectrum of major manifestations of law — common law, statutory law, constitutional law, and procedure — in both the first year and in their upper class courses.⁸

Unfortunately, there is little pressure on the law schools to adopt significant, educational reforms. The major law firms seem not to care much about law school curriculum requirements, presumably because so much practice is now specialized and many practitioners believe that young associates can gain specialized training on the job. And, of

6. Robert C. Clark, Remarks at the 2000 Judicial Conference, United States Courts for the District of Columbia Circuit, Williamsburg, Va., Panel Discussion: Legal Education in the 21st Century, 2-3 (Jun. 15, 2000), *available at* http://www.cadc.uscourts.gov/common/jconf/Legal_Edu_All.pdf.

7. John Sexton, Out of the Box — Thinking About the Training of Lawyers in the Next Millennium, Address to the American Bar Association (Aug. 2000), *in* NYU LAW SCHOOL MAG., Autumn 2000, at 34, 36.

8. *Id.* at 39. I would add international law to this list.

course, law professors (myself included) have no real incentive to abandon an academic tradition that affords them great freedom in deciding what to teach.

The simple truth is that there is no coherent bridge between legal education and the practice of law.⁹ The January 2002 edition of the *ABA Journal* documents the fact that “the practice of law has been rocked by more than a decade of upheaval,”¹⁰ causing some futurists to suggest that “we could be on the verge of seeing the disappearance of the practice of law as a distinctive profession in American life.”¹¹ In such a setting, it is easy to understand why some legal academics have moved more toward a “graduate school” model of education.

In any event, it is a fact of life now that legal education often does not give law students a good picture of law practice. And it is well known that modern law firm practice has disenchanted many young lawyers. They see it as a big money enterprise — resulting in unreasonable hours, tedious work, and sometimes questionable ethical decisions. Large numbers of graduates still seek employment in the major firms, for the money is good and it helps to pay off school debts. But a number of young lawyers leave big-firm practice after only a short stay. Often, some of the brightest young lawyers seek to move from practice to the teaching of law as quickly as possible, with little practical knowledge or professional experience. And in recent years, a number of law schools have adopted policies of hiring only those candidates who have published major articles before beginning the application process, thus favoring persons who have earned PhDs and excluding bright young lawyers with significant practice experience. This exacerbates the distressing disconnection between legal education and legal practice.

Nonetheless, I am not a naysayer. Indeed, I am optimistic about the future of legal education. There has been a healthy debate within the academy over the past decade, and many law schools have made real strides in addressing some of the issues that we now face in legal education. I do not think the transformation of legal education is complete, but I think we are at least on the right path.

9. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993); Harry T. Edwards, *Another “Postscript” to “The Growing Disjunction Between Legal Education and the Legal Profession,”* 69 WASH. L. REV. 561 (1994); Harry T. Edwards, *A New Vision for the Legal Profession*, 72 N.Y.U. L. REV. 567 (1997); MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); SOL M. LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994).

10. *Looking Forward, Looking Back*, A.B.A. J., Jan. 2002, at cover page.

11. Terry Carter, *Law at the Crossroads*, A.B.A. J., Jan. 2002, at 29, 34 (quoting Yale law professor, Robert W. Gordon).

Before I conclude my reflections, I want to say again how pleased I was to be invited to participate in the *Law Review's* Centennial Celebration. My allegiance to Michigan is as strong now as it was when I graduated in 1965. I love the law school, second to none. My time at Michigan, both as a student and as a law professor, enriched my professional life immeasurably and gave me many loyal and cherished friends.

When I was preparing these reflections, I thought a lot about the intangible rewards that I have enjoyed by virtue of my association with the University of Michigan Law School. Three things immediately came to mind. First, my education at the University of Michigan Law School gave me real confidence in my abilities. I was taught by my mentors — especially Professors Russell Smith, Roger Cramton, and Frank Allen — to aim high, determine the full reach of my ability, and then do what had to be done. No whining . . . just do it — whether it be teaching a class, trying a case, writing an article, giving a speech, or serving as a judge. My mentors were venturesome, demanding, and sometimes impatient, but very disciplined. They were fearless in their work and intolerant of poor performance. They were sterling role models, and I have strived hard to follow their leads. They gave me the confidence to achieve when I left law school.

Second, my time at Michigan, both as a student and a professor, taught me the value of collegiality. I was nurtured and inspired by my student classmates and my teaching colleagues. We learned lessons together and shared ideas. And we enjoyed one another.

I remember talking with a professor from another preeminent law school a number of years ago, just after he had finished teaching as a visitor at Michigan. He was literally bubbling over with enthusiasm, telling me how wonderful it had been to share time and ideas with members of the Michigan faculty. This professor believed, as do I, that professional collegiality invariably enhances performance, because it allows people to trade ideas without acrimony, which in turn helps to advance learning.

A similar sort of collegiality among my judicial colleagues was one of my main goals during my term as Chief Judge of the D.C. Circuit. I worked hard to encourage it. My colleagues were happy to embrace it. And we all agree that the court is a better place in which to work because of it. I have Michigan to thank for instilling in me some important ideas about the worth of collegiality.

Finally, my time at Michigan Law School made me very skeptical of ideological labels, such as “conservative” or “liberal,” and it has caused me to reject the now fashionable view that the answer to every question must be assessed in ideological terms. A number of my classmates at Michigan held political views that were more conserva-

tive than mine, but they were nonetheless brilliant, thoughtful, interesting, challenging, and supportive. We shared ideas, to our mutual advantage, often finding common-ground solutions to seemingly insurmountable problems.

I found the same to be true of most of my faculty colleagues at Michigan. My mentor, Russell Smith, had some political views that I did not share. That did not deter him from doing everything in his power to advance my professional career, including ensuring the publication of my first case book. Professor J. J. White and I were never ideological compatriots, yet neither he nor I hesitated for a second when we decided to collaborate in teaching the negotiation course and in co-authoring a book on negotiations.¹² There are many other examples that I could cite.

I have no doubt that what I experienced at Michigan has had a profound effect on my work as a judge. I reject the view that judges are largely lawless in their decisionmaking, influenced more by personal ideology than legal principles. I believe that principled decision making is not a foolish idea. In my view, it is the worst indictment for judges to be labeled political partisans and to be seen as result-oriented in their decision making. The strength of my conviction is attributable in no small measure to my time at the Michigan Law School.

The Centennial Celebration of the *Michigan Law Review* is a fitting tribute to an extraordinary journal, one that has served the academy and the legal community with consistent high quality and great distinction for all these years. I am proud to be part of this history. I am not sure that any “keynote” address can do justice to the glorious traditions of the *Michigan Law Review* and the University of Michigan Law School, but I am deeply honored to have been invited to undertake the assignment.

12. HARRY T. EDWARDS & JAMES J. WHITE, *THE LAWYER AS A NEGOTIATOR* (1977).